apparently agree with the Eighth Circuit, which recently adhered to its "firmly established" rule that the protection afforded by the Sixth Amendment has no application until after criminal proceedings are instituted. *Terlikowski* v. *United States*, 379 F. 2d 501, 504 (C.A. 8); certiorari denied, 389 U.S. 1008. See *United States* v. *Durham*, 413 F. 2d 1003 (C.A. 5), certiorari denied, 396 U.S. 839; *Benson* v. *United States*, 402 F. 2d 576 (C.A. 9); *Pitts* v. *North Carolina*, 395 F. 2d 182 (C.A. 4); *Hoopengarner* v. *United States*, 270 F. 2d 465 (C.A. 6); *United States* v. *Dallago*, 311 F. Supp. 227 (E.D. N.Y.). These jurisdictions generally look to the statute of limitations as exclusively controlling the question of fairness of pre-indictment delay. Cf. *United States* v. *Ewell*, 383 U.S. 116, 122. Others, however, have adopted a more flexible rule, observing that it is possible to conceive of delay shorter than the period of the statute of limitations but nevertheless so unreasonable and seriously prejudicial to the defendant under the circumstances of a particular case that relief must be afforded, if not under the Sixth Amendment, then under the due process clause of the Fifth Amendment. *United States* v. *Lee*, 413 F. 2d 910 (C.A. 7), certiorari denied, 396 U.S. 1022; *United States* v. *Napue*, 401 F. 2d 107 (C.A. 7), certiorari denied, 393 U.S. 1024; *United States* v. *Capaldo*, 402 F. 2d 821 (C.A. 2), certiorari denied, 394 U.S. 989; *United States* v. *Feinberg*, 383 F. 2d 60, 64–65 (C.A. 2), certiorari denied, 389 U.S. 1044; *Acree* v. *United States*, 418 F. 2d 427 (C.A. 10); but see *United States* v. *Reed*, 413 F. 2d

338 (C.A. 10), certiorari denied *sub nom. Sartain* v. *United States,* 397 U.S. 954.

Even under the latter approach, the dismissal of the indictment solely because of pre-indictment delay was erroneous in the instant case. Prosecutorial delay *per se* has never been regarded as justifying the extraordinary remedy of discharging a lawsuit; to justify this drastic result, at least there must be a showing that the government's conduct was "purposeful or oppressive". *Pollard* v. *United States,* 352 U.S. 354, 361. This Court has never delineated the precise meaning of these terms. Perhaps no clearcut legal definition is readily possible, since the situations in which speedy trial claims arise are so widely varied. But the conduct shown here can not fairly be characterized as either purposeful or oppressive even in the broadest sense; at most what has been shown is non-action on the part of the government, with no specific benefit intended to be or actually derived from the delay.[2] In any event, the government's primary reason for delaying was the absence of a sufficient work force to deal with cases such as the instant one, and the need to use available manpower to prosecute offenses commanding a higher priority, particularly crimes of violence.[3] Such "institutional inefficiency,"

[2] Indeed, given the notoriety of appellees' practices in 1967, it is conceivable that the bringing of the indictment in 1970 might have protected them against a trial affected by contemporary publicity.

[3] Judge Hart remarked that sometime during the period of delay he attempted to urge the Department of Justice to provide more assistance to the United States Attorney and that he heard that the United States Attorney had informed the Assistant Attorney General in charge of the Department's Crim-

Hinton v. *United States*, 424 F. 2d 876, 881 (C.A. D.C.), while unfortunate, is not cured by dismissing cases when action is finally taken, unless there is injustice in a particular case.

Moreover, even if the government's inaction were regarded as purposeful or oppressive, this still would not warrant dismissal of the indictment unless serious prejudice to the appellees were established. The prejudice usually required to support a speedy trial claim relates to absence of critical witnesses, faulty memories and loss of evidence. Some of these factors may be affected by defendant's remaining in jail before trial. But here the appellees were not incarcerated and the only conceivable harm from pre-indictment delay would be increased difficulty in reconstructing revelant evidence which has not been preserved through documentation. This sort of inherent prejudice has not been deemed to warrant the extreme result of dismissal, except in the most unusual and clearly distinguishable case of *Ross* v. *United States*, 349 F. 2d 210 (C.A. D.C.). The *Ross* court later limited that decision to its facts, and refused to sustain speedy trial motions unless there is a showing of prejudice beyond that which is the ordinary and inevitable result of delay. *Tynan* v. *United States*, 376 F. 2d 761 (C.A. D.C.), certiorari denied, 389 U.S. 845. See also *United States* v. *Orsinger*, No. 22,756 (C.A. D.C.) decided June 3, 1970, certiorari pending,

inal Division that additional help was not needed (Tr. 11, 24). These hearsay matters, even if proper for the court's consideration in this particular case, hardly amount to purposeful or oppressive behavior, especially in the absence of any showing that extra help was available.

No. 442, this Term; *Post* v. *United States,* 407 F. 2d 319, 320 n. 3 (C.A. D.C.), certiorari denied, 393 U.S. 1092. Here, as in *United States* v. *Ewell, supra,* 383 U.S. at 122, any possible claim of prejudice to the appellees in defending themselves is "insubstantial, speculative and premature."

Last term, in *Dickey* v. *Florida,* 398 U.S. 30, the Court reviewed a claim based upon the right to a speedy trial. Since in that case the delay was found to be purposeful and the prejudice was readily apparent, the Court did not have to consider such matters as the right of a defendant to challenge delays occurring prior to arrest or indictment, the need to establish prejudice, or the degree of prejudice that must be shown. Mr. Justice Brennan, in his concurring opinion, observed that "the Court has as yet given scant attention to these and other questions essential to the definition of the speedy-trial guarantee." 398 U.S. at 40. This case provides an appropriate vehicle to examine the right to a speedy trial further in an effort "to trace its contours." 398 U.S. at 41.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should note probable jurisdiction.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
MERVYN HAMBURG,
Attorneys.

OCTOBER 1970.

405-622—70——2

APPENDIX A

Oral Opinion of the District Court, June 8, 1970

The COURT. It appears to the Court that the matters complained of occurred between March 1965 and January 1966. It further appears that these matters were known from early 1967 or a matter of common knowledge in late 1967. There appears no reason why a three-year delay from 1967 was justified by the necessity of research and examination delving into the various transactions, they could have been discovered and handled much, much sooner, certainly probably during the year 1967 or at the latest early 1968.

The defendants have been indicted on 19 counts, each of which I believe carries a ten-year sentence, each of which is a separate, distinct transaction which would justify consecutive sentences, and by the very nature of this outrageous scheme if the allegations could be believed, the ability to remember, to build up in one's recollection, to produce the necessary defense, is bound to have been seriously prejudiced by the delay of at least some three years in bringing the prosecution that should have been brought in 1967, or at the very latest early 1968.

The Court, therefore, views that there has been a lack of speedy prosecution in this case, and will grant the motion to dismiss.

APPENDIX B

In the United States District Court for the District of Columbia

No. 672–70. Criminal

UNITED STATES OF AMERICA

v.

WILLIAM R. MARION, SR., ET AL

ORDER

Upon consideration of the Motion of the defendant William R. Marion, Sr., to Dismiss Indictment for Failure to Afford Speedy Trial (adopted by the defendant Samuel C. Cratch, Jr.), and the Memoranda of Points and Authorities and Exhibits submitted in support thereof and in opposition thereto, and the oral argument of counsel thereon, for the reason set forth in the oral Opinion of the Court of June 8, 1970, it is, this 8th day of June, 1970.

Ordered, That the Motions to Dismiss the Indictment be and they are hereby granted as to both defendants, and the Indictment, and each Count thereof, is dismissed as to both defendants.

/s/ George L. Hart, Jr.,
Judge.

I hereby certify that copies of the foregoing and annexed Order were this 8th day of June, 1970, mailed, postage prepaid, to Sandor Frankel, Esq., Assistant United States Attorney, United States Courthouse, Washington, D.C., and to Benjamin W. Cotten, Esq.,

attorney for Samuel Cratch, 1314 19th Street, N.W., Washington, D.C.

/s/ T. P. Jackson,
THOMAS PENFIELD JACKSON.

A True Copy

ROBERT M. STEARNS,
Clerk.

By ESTHER E. CUEDEN,
Deputy Clerk.

APPENDIX C

United States District Court for the District of Columbia

No. 672–70. Criminal

UNITED STATES OF AMERICA

v.

WILLIAM R. MARION, SR., SAMUEL C. CRATCH, JR.

NOTICE OF APPEAL

Notice is hereby given that the United States of America hereby appeals, pursuant to 18 U.S.C. § 3731, to the Supreme Court of the United States from the order of this Court entered June 8, 1970, dismissing the indictment herein.

THOMAS A. FLANNERY,
United States Attorney.
JOHN A. TERRY,
Assistant United States Attorney.
SEYMOUR GLANZER,
Assistant United States Attorney.
SANDOR FRANKEL,
Assistant United States Attorney.

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing notice of appeal has been mailed to Thomas P. Jackson, Esquire, counsel for defendant Marion, at 1828 L Street, N.W., Wash., D.C. 20036, and Benjamin W. Cotten, Esquire, counsel for defendant Cratch at 1314 19th Street N.W., Wash., D.C. 20036, this 8th day of July, 1970.

JOHN A. TERRY,
Assistant United States Attorney.

APPENDIX D

United States District Court for the District of Columbia

Holding a Criminal Term, Grand Jury Sworn in on September 2, 1969

Criminal Case No. ——

UNITED STATES OF AMERICA

v.

WILLIAM R. MARION, SR., SAMUEL C. CRATCH, JR.

Grand Jury Original ——

Violations: 18 U.S.C. 1341 (Mail Fraud); 18 U.S.C. 1343 (Wire Fraud); 18 U.S.C. 2314 (Transportation of Falsely Made, Forged, and Altered Securities); 18 U.S.C. 2 (Aiding and Abetting)

The Grand Jury charges:

COUNT 1

1. From on or about March 15, 1965 and continuing thereafter up to and including February 6, 1967, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants herein, unlawfully, wilfully and knowingly devised and intended to devise a scheme and artifice to defraud Alonzo Shearer, Thelma Shearer, Lawrence Hatton, Edna Hatton, William Jones, Evelyn Jones, Allie Mae Asberry, Bettie P. Staley, Sereta S. Staley, Lucille N. Brooks, Rosa Johnson, Inez Johnson, Rev. Andrew Williams, James Gray, Marion Gray, Sherman Webster, Samuel Duncan, Alice Dun-

can, George Crutchfield, Ruth Crutchfield, Geneva Gardner, and divers other persons, each and all of whom were members of and constituted a class of persons who possessed and enjoyed a right, title and interest in real property, and are herewith referred to as the Homeowners, and to obtain money and property by false and fraudulent pretenses, promises, and representations which pretenses, promises, and representations the defendants well knew would be and were false and fraudulent when made.

2. It was part of said scheme and artifice to defraud that the defendants would and did operate a corporation trading as Allied Enterprizes, Inc. ("Allied"), and would and did maintain offices at 4550 Rhode Island Avenue, North Brentwood, Maryland, from which address the defendants would and did trade as Allied, and over whose affairs and policies the defendants would and did exert their influence and control.

3. It was a further part of said scheme and artifice to defraud that the defendants would and did cause an intensive sales campaign by telephone solicitors and salesmen to be utilized in order to promote in the District of Columbia and elsewhere the sale of home intercom systems, burglary detection systems, fire control systems, and similar systems.

4. It was a further part of said scheme and artifice to defraud that the defendants would and did directly and indirectly by false and fraudulent pretenses, promises, and representations induce the Homeowners to enter into purported contracts for the installation of said systems, including, but not limited to, the false representation that Homeowners, by providing "Allied" with names and addresses of friends and acquaintances as prospective customers, would be participating in a sales-referral plan which would sub-

stantially reduce the cost of said systems to the Homeowners and provide financial benefits to the Homeowners.

5. It was a further part of said scheme and artifice to defraud that the defendants would and did prevent the Homeowners from canceling installation of the aforementioned systems by making token starts on the installation following the signing of the purported contracts but before Homeowners' credit had been approved, which practice was referred to as "spiking."

6. It was a further part of said scheme and artifice to defraud that the defendants would and did induce the Homeowners to sign documents the nature and character of which was falsely represented to and concealed from the Homeowners, to wit, documents styled (1) deeds of trust and (2) promissory notes.

7. It was a further part of said scheme and artifice to defraud that the defendants would and did alter the documents styled deeds of trust and promissory notes by thereafter inserting or causing to be inserted the following:

(a) trustees,
(b) date,
(c) payor,
(d) description of the properties to which said documents would pertain,
(e) principal amounts of indebtedness,
(f) terms of payment,
(g) interest charges, and
(h) late payment charges

without the knowledge, consent, or authority of the Homeowners.

8. It was a further part of said scheme and artifice to defraud that the defendants would and did cause to be certified by a notary public, an officer authorized to take acknowledgement of signatures on instruments

which by law may be recorded, that Homeowners personally appeared before a notary public and acknowledged the signatures appearing on the herein mentioned documents styled (1) deeds of trust and (2) promissory notes to be their act and deed.

9. It was a further part of said scheme and artifice to defraud that the defendants would and did cause for their monetary gain the transfer of the herein abovementioned (1) deeds of trust and (2) promissory notes to persons and firms who would purport to be and would masquerade as "holders in due course" and who would collect from the Homeowners monies purportedly due and owing on the deeds of trust and promissory notes.

10. It was a further part of said scheme and artifice to defraud that the defendants would and did knowingly, unlawfully and willfully make and cause to be made false and fraudulent pretenses, promises and representations to Homeowners well knowing at the time that the said pretenses, promises and representations would be and were false when made, including, but not limited to, the false representation that the deeds of trust and promissory notes were mere revisions of and additions to the original contracts.

11. It was a further part of said scheme and artifice to defraud that the defendants would and did, knowingly and willfully, cause to be concealed and did fraudulently conceal from Homeowners the following:

(a) The character and nature of the documents which Homeowners were induced to sign;

(b) Deeds of trust signed by unsuspecting Homeowners would be and were thereafter notarized;

(c) Deeds of trust signed by Homeowners would be and were recorded in the land records of the District of Columbia;

(d) Documents bearing the signatures of Homeowners as thereafter completed would be and were transferred to third parties for money.

12. It was a further part of said scheme and artifice to defraud that the defendants would and did cause certain "congratulatory letters" and token checks to be transmitted to Homeowners for the purpose of and with the intent to lull said Homeowners into inaction concerning the defendants' fraudulent actions and misrepresentations with respect to the chain referrals and the documents styled contracts, deeds of trust, and promissory notes.

13. On or about September 3, 1965, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, knowingly, willfully, and unlawfully caused to be delivered in the District of Columbia by the United States mails according to the directions thereon an envelope and letter addressed to Alonzo Shearer, 1218 Oates Street, N.E., Washington, D.C.

(Violations 18 U.S.C. 1341 and 2)

COUNT 2

1. The Grand Jury realleges, and hereby incorporates by reference, all of the allegations of Count 1 of this indictment with the exception of those contained in paragraph 13 thereof.

2. On or about September 17, 1965, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, knowingly, willfully, and unlawfully caused to be delivered in the District of Columbia by the United States mails according to the directions thereon an envelope and let-

ter addressed to Lawrence Hatton, 408 13th Street, N.E., Washington, D.C.

(Violations 18 U.S.C. 1341 and 2)

COUNT 3

1. The Grand Jury realleges, and hereby incorporates by reference, all of the allegations of Count 1 of this indictment with the exception of those contained in paragraph 13 thereof.

2. On or about November 3, 1965, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, knowingly, willfully and unlawfully caused to be delivered in the District of Columbia by the United States mails according to the directions thereon an envelope and letter addressed to William Jones, 2701 24th Street, N.E., Washington, D.C.

(Violations 18 U.S.C. 1341 and 2)

COUNT 4

1. The Grand Jury realleges, and hereby incorporates by reference, all of the allegations of Count 1 of this indictment with the exception of those contained in paragraph 13 thereof.

2. On or about December 16, 1965, in the District of Columbia, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, knowingly, willfully and unlawfully did transmit and cause to be transmitted in interstate commerce by means of a wire communication, sounds, to wit, a telephone call between Allied Enterprizes, Inc., 4550 Rhode Island Avenue, North

Brentwood, Maryland and Allie Mae Asberry, 115 5th Street, N.E., Washington, D.C.

(Violations 18 U.S.C. 1343 and 2)

COUNT 5

1. The Grand Jury realleges and hereby incorporates by reference, all of the allegations of Count 1 of this indictment with the exception of those contained in paragraph 13 thereof.

2. On or about December 23, 1965, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, knowingly, willfully, and unlawfully caused to be delivered in the District of Columbia by the United States mails according to the directions thereon an envelope and letter addressed to Mrs. George H. Staley, 4643 Minnesota Avenue, N.E., Washington, D.C.

(Violations 18 U.S.C. 1341 and 2)

COUNT 6

On or about August 9, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signature Lucille N. Brooks, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 7

On or about August 12, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fradulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signatures Alonzo Shearer and Thelma Shearer, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 8

On or about August 20, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signature Rosa Johnson, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 9

On or about September 5, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signatures Lawrence Hatton and

Edna Hatton, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 10

On or about September 10, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled, "Deed of Trust" and "Promissory Note" bearing the signature Inez Johnson, knowing the same to have been falsely made, forged, and altered.

(Violations of 18 U.S.C. 2314 and 2)

COUNT 11

On or about October 4, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signatures Bettie P. Staley and Sereta S. Staley, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 12

On or about October 26, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and

cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signature Rev. Andrew Williams, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 13

On or about October 30, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signatures William Jones and Evelyn Jones, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 14

On or about December 19, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signatures James Gray and Marion Gray, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 15

On or about December 21, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signature Sherman Webster, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 16

On or about December 23, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signature Allie Mae Asberry, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 17

On or about December 27, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signatures Samuel Duncan and

Alice Duncan, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 18

On or about January 1, 1966, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signatures George Crutchfield and Ruth Crutchfield, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 19

On or about January 19, 1966, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signature Geneva Gardner, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

____ ____,

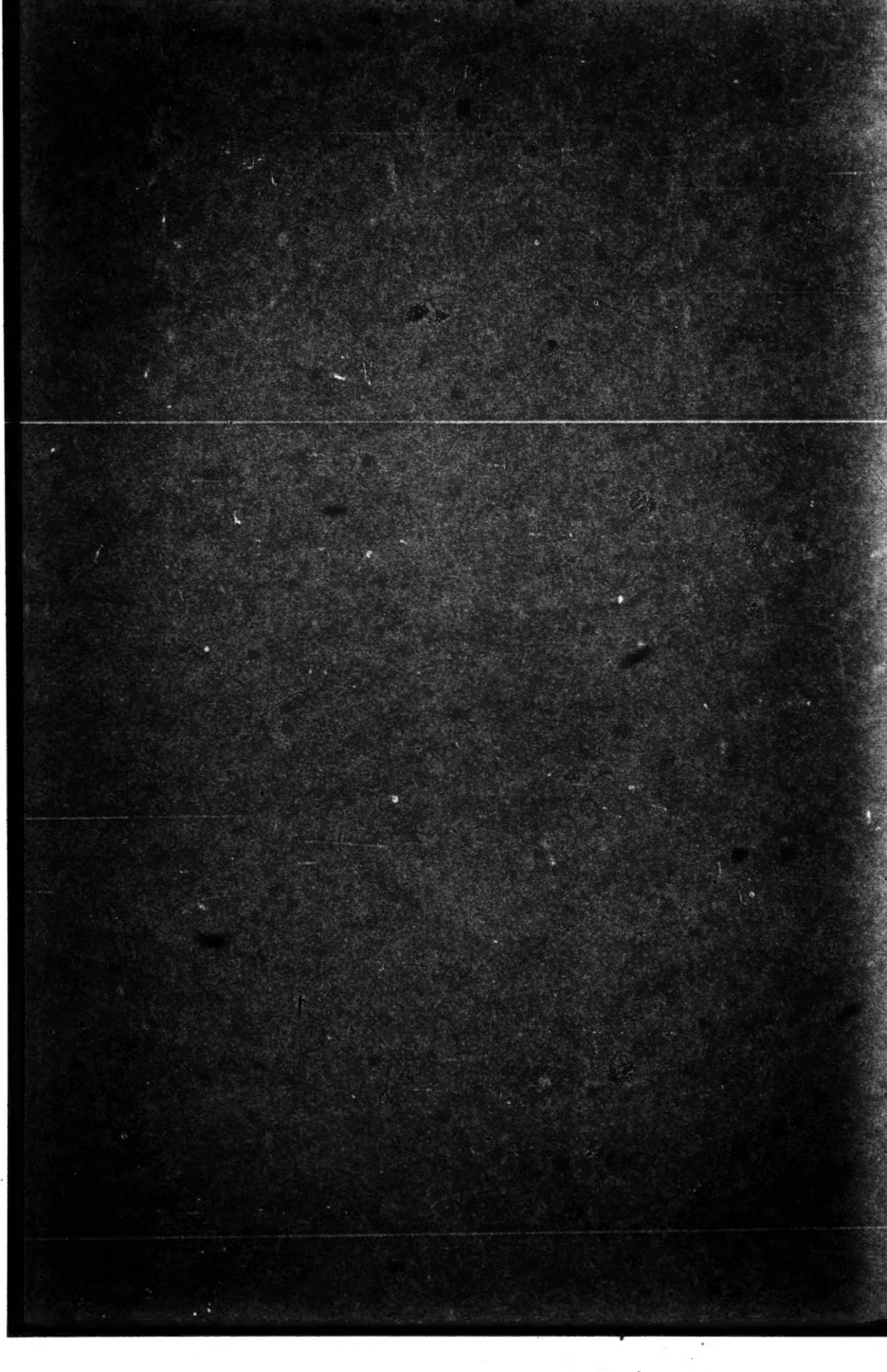
Attorney of the United States,
in and for the District of Columbia.

A True Bill:

____ ____,

Foreman.

U.S. GOVERNMENT PRINTING OFFICE: 1970



IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 810

UNITED STATES OF AMERICA, *Appellant*,

v.

WILLIAM R. MARION, SR., ET AL., *Appellees*.

On Appeal From the United States District Court for the District of Columbia

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MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the United States Supreme Court Rules, appellees William R. Marion and Samuel C. Cratch move the Court to dismiss the appeal herein on the grounds that the appeal is not within the jurisdiction of the Court. In the alternative, appellees move the Court to affirm the judgment of the United States District Court for the District of Columbia on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I.

An Appeal by the Government to the Supreme Court From the Dismissal of the Indictment Is Not Authorized by the Criminal Appeals Act.

Appellate jurisdiction of Federal courts exists only to the extent expressly conferred by statute. *Carroll* v. *United States,* 354 U.S. 394 (1957). Authority for appeals by the Government in criminal cases is provided by the Criminal Appeals Act, 18 U.S.C., § 3731, but such appeals are "unusual, exceptional, not favored," *Carroll* v. *United States, supra,* at 400, and the statute will be strictly construed against the Government's right of appeal. Not only does an appeal by the Government from a judgment terminating a criminal prosecution favorably to the accused "offend the policies behind the double-jeopardy prohibition," *Will* v. *United States,* 389 U.S. 90, at 96 (1967), but, when the judgment is entered upon a motion prior to trial in a pending case, delays any trial ordered upon reversal for the duration of the appellate proceedings. *Will* v. *United States, supra.*

The Government asserts that this Court's jurisdiction to entertain the instant direct appeal from the decision of the United States District Court depends upon that portion of the Criminal Appeals Act, 18 U.S.C., § 3731, providing for review by this Court of

> ". . . the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy."

In the relatively few instances in which the Court has expressly decided whether the decision it was being asked by the Government to review was one sustaining a motion (or plea) "in bar," the Court has been influenced by theories of common law pleading under-

lying the language of the statute. See *United States* v. *Storrs,* 272 U.S. 652 (1926), and Brennan, J., concurring in *United States* v. *Mersky,* 361 U.S. 431, at 441 (1960). Compare *United States* v. *Sisson,* 399 U.S. 267 (1970). But the Court has stated that it intends to look beyond the pleadings to "the effect of the ruling sought to be reviewed." If the effect is "to end the cause and exculpate the defendants," then it will be treated as a "bar" to the prosecution and, thus, appealable to the Court. *United States* v. *Hark,* 320 U.S. 531, at 536 (1944); *United States* v. *Blue,* 384 U.S. 251 (1966).

Nevertheless, not all pre-trial motions by defendants which, when granted, terminate the prosecution as a result of the Government's practical inability or unwillingness to proceed are considered motions "in bar." *Carroll* v. *United States,* 354 U.S. 394 (1957) Nor are post-trial motions vitiating convictions always treated as decisions "arresting a judgment" similarly appealable. *United States* v. *Sisson,* 399 U.S. 267 (1970).

Appellees' Motion to Dismiss the indictment for failure to afford a speedy trial was grounded upon both the 5th and 6th Amendments to the Constitution of the United States. (Appellees' Appendix, page 11). In ruling upon the Motion, however, the District Judge made no reference whatsoever to the Constitution. After summarizing the chronology of the alleged offenses and the Government's delayed reaction, the District Judge stated

> "The Court, therefore, views that there has been a lack of speedy prosecution in this case, and will grant the Motion to Dismiss." (Appellant's Appendix A, page 11).

The decision thus appears to have been based upon Rule 48(b) F.R.Crim.P., which provides

> "If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

This Court has not to date, to appellees' knowledge, decided whether dismissal of an indictment for "unnecessary delay in presenting the charge to a grand jury" is a "decision or judgment" of a District Court subject to review on direct appeal of the Government to this Court under 18 U.S.C., § 3731. A motion to dismiss for want of prosecution, however, is universally regarded as one addressed to discretion of the trial judge. *United States* v. *McWilliams,* 163 F.2d 695 (D.C. Cir. 1947); *Nickens* v. *United States* 323 F.2d 808 (D.C. Cir. 1963), certiorari denied, 379 U.S. 905.

As a practical matter, the Order of the District Court granting appellees' Motion to Dismiss the indictment may terminate proceedings under this indictment. It does not as a matter of law, however, purport to preclude the Government's ever attempting to prosecute for the same events, nor does it "exculpate" the defendants.

And, as a discretionary ruling, grounded on a unique state of facts not appearing in the indictment, this decision of a single District Judge imperils no contrary decisions in other districts, nor does it frustrate law enforcement efforts in other cases in the District of Columbia. It merely reflects the opinion of one Dis-

trict Judge that the Government, having knowledge of an alleged crime, and the identity of the one alleged to have committed it, for its own reasons dallied too long in beginning prosecution for it. Thus, it is not within the policy sought to be implemented by the Criminal Appeals Act. See *United States* v. *Mersky*, 361 U.S. 431, at 434-436 (1960). Moreover, to allow a direct appeal to the Court here would interpret the jurisdiction of the Court to include other discretionary rulings which, as practical matters, end the prospect of criminal prosecution. The Court has, in other circumstances, found expansive construction of its appellate jurisdiction not warranted solely for that reason. *American Security and Trust Co.* v. *Commissioners of District of Columbia*, 224 U.S. 491 (1912).

II.

The District Court's Dismissal of the Indictment Was Justified on Both Discretionary and Constitutional Grounds.

The indictment dismissed by the District Court charged that from March 15, 1965, through February 6, 1967, the co-defendants had engaged in a "scheme and artifice to defraud," in connection with the business of Allied Enterprizes, Inc., namely, the credit sale to home-owners of electronic intercom and fire alarm systems, with the deferred portion of the purchase price secured by deeds of trust of the purchasers' homes. The defendants were charged (each as both a principal and as an aider-and-abettor), in 19 counts accusing them of mail fraud, wire fraud, and interstate transportation of fraudulent securities, committed against 21 named victims and others unnamed on unspecified dates during the 23-month period embraced in the indictment. Allegations as to the fraud supposed to have been committed and the identity of the

victims were imprecise, e.g. "including, but not limited to" (Count 1, paragraph 4); "and divers other persons," (Count 1, paragraph 2); and in the conjunctive, e.g., "falsely made, forged, *and* altered" securities (Counts 6-19. Emphasis supplied), (Appellant's Appendix D, pages 15-26).

On December 8, 1966, the Federal Trade Commission docketed its Complaint charging the appellees and Allied Enterprizes, Inc., with violations of the Federal Trade Commission Act, and that proceeding culminated in a cease-and-desist order entered by default February 6, 1967. In September and October of 1967, the business practices of Allied Enterprizes, Inc., and similar firms in Washington, D. C., metropolitan area were the subject of a series of articles in *The Washington Post,* charging the firms with fraud and purporting to quote the then U. S. Attorney as to the prospect of prosecution which, at the time, was said to be imminent. (Exhibits B-M to Defendant Marion's Motion to Dismiss). Allied Enterprizes, Inc., was specifically named in an article dated October 4, 1967 (*Id.,* Exhibit F).

In "the summer of 1968" Marion voluntarily delivered all of the records of Allied Enterprizes, Inc., to the U. S. Attorney, where they remain today.

Not until March 16, 1970, however, did Marion become aware that a Grand Jury had actually begun an investigation (Motion to Dismiss, paragraph 5, Appellees' Appendix, page 12), and the indictment was not filed until April 21, 1970.

Thus, it is apparent that Federal authorities (the FTC) were aware (and critical) of appellees' activities in December of 1966, and the entire community was

apprised of those activities in October of 1967. The only explanation offered by the Government for a delay of nearly three-and-one-half years in initiating prosecution was a "heavy case load" and an "understaffed" U. S. Attorney's office in the District of Columbia. (Jurisdictional Statement, pages 4, 7).

The Government's Opposition to the Motion to Dismiss contended that the Constitutional right to a speedy trial does not attach until after arrest or indictment, the time within which the Government must indict following an offense being measured exclusively by the statute of limitations. Its Jurisdictional Statement acknowledges an exception for "purposeful or oppressive" delay. (Jurisdictional Statement, page 7). Moreover, the Government contends actual prejudice need be shown before a defendant becomes entitled to dismissal for pre-indictment delay (Jurisdictional Statement, page 8).

Appellees submit that neither proposition is sound.

To permit the statute of limitations to be the exclusive measure of the time the Government shall have to begin prosecution of one suspected of a crime, regardless of the time when the Government learned of the offense and the identity and whereabouts of the accused, confers upon Congress the exclusive power to determine the dimensions of a constitutional right.* See Brennan, J., concurring in *Dickey* v. *Florida,* 398 U.S. 30, at 47 (1970). Moreover, the ministerial formality of the filing of an indictment, an event entirely within the control of the Government, is a nearly

* Title 18, U.S.C. § 3282, the statute of limitations on non-capital crimes, was amended September 1, 1954, to increase the period of limitations from three to five years.